Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1210

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

v.

MANUFACTURERS HANOVER TRUST COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1977

No. .....

Alitalia-Linee Aeree Italiane, S.p.A.,

Petitioner,

v.

Manufacturers Hanover Trust Company,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 1, 1977.

Opinions Below

The order of the Court of Appeals is not reported either officially or unofficially; it is printed in the Appendix to this Petition at pages A1 to A2.

The opinion of the District Court, upon which the Court of Appeals relied in affirming, is reported at 429 F.Supp. 964 (S.D.N.Y. 1977) and is printed in the Appendix at pages A3 to A12.

Jurisdiction

The judgment of the Court of Appeals was entered on December 1, 1977. Appendix at page A1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

On January 4, 1974, three armed gunmen robbed petitioner's[1] high value cargo security room at J.F.K. International Airport, New York, of $200,000 in cash which belonged to respondent.[2] The shipment of cash was awaiting transport to Libya. In an action brought by Hanover, the liability of Alitalia for the loss was determined by the provisions of the Warsaw Convention,[3] a treaty of the United States, and, specifically, Article 20 which provides, in pertinent part:

> The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

The District Court found Alitalia liable because it held that Article 20 required a carrier to take "all reasonable measures" and found that there were two "reasonable measures" Alitalia did not take. However, the District Court refused to find that those two reasonable measures would have avoided the loss.

---

[1] Petitioner Alitalia Linee-Aeree Italiane, S.p.A. will hereinafter be referred to as Alitalia.

[2] Respondent Manufacturers Hanover Trust Company will hereinafter be referred to as Hanover.

[3] *Convention for the Unification of Certain Rules Relating to International Transportation by Air,* 49 Stat. 3000; T.S. 876 (1934). Hereinafter referred to as the Convention.

The questions presented for review, therefore, are:

1. Whether Article 20 of the Warsaw Convention was correctly interpreted by the Court below to require an air carrier to take *"all* reasonable measures" whether or not they would avoid the damage?

2. Whether the correct interpretation of Article 20 requires only that an air carrier take "reasonable measures" to avoid the damage alleged?

Statutory Provisions Involved

Convention for the Unification of Certain Rules Relating to International Transportation by Air.

• • •

Chapter III.
Liability of the Carrier

• • •

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

49 Stat. 3019.

• • •

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

49 Stat. 3019.

Statement of the Case

A. The Facts

On January 4, 1974, Hanover sent a parcel containing $200,000 in cash to Alitalia's cargo facility at J.F.K. International Airport for shipment to Libya.

When Alitalia first was informed of the shipment on January 2, 1974, it took the following security measures with regard to the shipment: (1) it severely restricted access to information concerning the contents of the shipment; (2) it arranged for an armed guard to be present to receive the shipment at 1 p.m. on January 4th; (3) it advised Hanover to deliver the shipment at 1 p.m.; (4) it arranged for an escort of Port Authority Police to accompany the shipment when it was to be placed on an aircraft.

When the shipment arrived on January 4, 1974 at 1 p.m., Alitalia took the following measures: (1) the shipment was logged-in in a way that did not divulge its contents; (2) the log was secured; (3) the shipment was placed in Alitalia's high-value room which was constructed entirely of cement

block with the exception of a steel door; (4) the door was locked at all times and could only be opened by a special key that could not be duplicated; and, (5) the armed guard was stationed in front of the door and was instructed to allow no one to enter except the Cargo Manager and the Assistant Cargo Manager of Alitalia.

At approximately 2:45 p.m. two armed gunmen, disguised as telephone repairmen, gained access to Alitalia's cargo facility. With drawn revolvers and threats to murder those who would not cooperate, the gunmen: (1) prevented a warning from going out; (2) locked all of Alitalia's employees in a Ladies Room; and, (3) coerced the Cargo Manager to open the high-value room. The gunmen, after pistol-whipping the Assistant Cargo Manager, escaped with the money. The gunmen have never been apprehended; the cash has never been recovered.

B. Proceedings in the Courts Below

On July 19, 1974, Hanover brought suit against Alitalia to recover for the loss of the money on the basis of its Air Waybill. Alitalia's Answer set out its Affirmative Defenses under the Convention's Article 20. On April 13, 1977, after a four day non-jury trial, the District Court for the Southern District of New York rendered its decision, granting judgment to Hanover. (App. A3-A12).

The crucial section of the District Court's opinion turned on the interpretation of Article 20 of the Convention. Article 20 states in pertinent part:

> (1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

49 Stat. 3019. The District Court held:

> Both plaintiff and defendant have devoted considerable efforts to explain and support their respective constructions of the phrase "all necessary measures." But, in the end, a common-sense reading serves best. Thus, notwithstanding plaintiff's argument to the contrary, this Court concludes that the phrase "all necessary measures" cannot be read with strict literality, but must, rather, be construed to mean "all *reasonable* measures." After all, there could scarcely be a loss of goods—and consequently no call for operation of Article 20—were a carrier to have taken every precaution literally necessary to the prevention of loss. Nor, on the other hand, may a carrier escape liability under Article 20, as Alitalia suggests, by demonstrating no more than its recourse to some—as opposed to all—reasonable measures.

429 F.Supp. at 967. App. at A8-A9.

Once the District Court had ascertained that the standard that Alitalia was required to meet was that it took "all reasonable measures", the District Court concluded that Alitalia's failure to take two economically reasonable measures prevented Alitalia from meeting that burden. In so concluding the District Court declined to make a finding as to whether either or both measures "would necessarily have averted the loss upon which the instant suit is based." 429 F.Supp. at 968. App. at A10.

The District Court likewise brushed aside Alitalia's contention that it met or exceeded the airline industry's security standards at JFK. Indeed, the District Court conceded the point where it stated:

> Other airlines at Kennedy Airport, at least until January 1974, may well have been less security conscious than was Alitalia; few, if any, may have been more so.

429 F.Supp. at 968-69 App. at A11-A12.

The District Court also declined to find any negligence on the part of Alitalia employees, stating:

> Nor, for that matter, can we say that Alitalia's employees, under the circumstances in which they found themselves on January 4, 1974, could and should have acted otherwise for the sake of thwarting their assailants' purpose. We conclude only—but nonetheless fatally for the defense—that Alitalia did not take *all reasonable measures* that prudent foresight would have envisioned for the securing of high-value cargo.

429 F.Supp. at 968. App. at A10 (emphasis added). Notwithstanding Alitalia's proof that it took several reasonable measures to avoid the loss, and that its employees were not negligent, the District Court held that Alitalia did not meet its burden of proof of taking "all reasonable measures" because of its failure to implement two measures—even though the District Court did not determine whether those measures would have avoided the loss.

The Court of Appeals affirmed, on the basis of the District Court's opinion, on December 1, 1977.

Reasons for Granting the Writ

The District Court has interpreted a Treaty of the United States, the Supreme Law of the land, in direct conflict with the plain language of the Treaty, the clear intent of the parties to the Treaty as shown in the "legislative history",

the official position of the Executive Branch of the United States Government, and finally, in conflict with other reported international authority that has dealt with, or interpreted, Article 20 of that Treaty.

The Warsaw Convention did not adopt an absolute liability system. Rather, Articles 17, 18, 20 and 21 of the Treaty comprise a fault system.[4] Article 18 creates a presumption of liability for the loss of cargo. Article 20, however, provides a reasonableness standard which allows the carrier to rebut the presumption, if the air carrier can show that it took *reasonable measures to avoid the damage.*

The District Court's interpretation of the Treaty was that a carrier must take "*all* reasonable measures" and held that Alitalia was liable to Hanover for not taking two measures which the court refused to find would have prevented the loss. This interpretation of Article 20 requiring a carrier to take "all reasonable measures" directly contradicts the Convention's liability system based on fault for it imposes liability on the basis of a failure to take measures that would not avoid the damage. Therefore, the District Court construed the Treaty language "all necessary measures to avoid the damage" to mean "all reasonable measures" regardless of whether they would avoid the damage.

The language of Article 20 itself, the drafters, parties, commentators, and cases will show that the meaning of Article 20 is that *the carrier shall not be liable if he proves that he and his agents have taken reasonable measures to avoid the damage.*

In discussing the certiorari jurisdiction of the Court, Chief Justice Vinson has stated:

[4] Article 17 deals with personal injuries and Article 21 deals with contributory negligence. Neither Article is involved in this case.

> The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws and treaties of the United States . . .

Address of Chief Justice Vinson before the American Bar Association (September 7, 1949) 69 S. Ct. v. and v.i.

The Warsaw Convention is one of the most broadly adhered to international treaties in existence. See, Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention,* 80 HARV. L. REV. 497 at 533 (1967). Its provisions govern the relations between airlines, passengers and shippers in virtually all international travel. Articles 18 and 20 are the cornerstones of the Convention's liability system based on fault. The interpretation of Article 20 adopted by the District Court would vitiate Article 20 as a defense to air carriers and would replace the fault element that underlies the Convention's liability system with one of no-fault.

The language of Article 20, as it stands, contradicts the District Court's interpretation. The phrase "all necessary measures to avoid the damage" clearly requires that the "measures" relevant to the carrier's burden under Article 20 are those necessary to avoid the damage. The fact that the District Court held Alitalia liable because of its failure to take two measures which the court refused to find "would necessarily have averted the loss", shows that the District Court has interpreted "all necessary measures to avoid the damage" to be "all reasonable measures" whether or not they would have avoided the damage, in derogation of the language of Article 20.

The Court has stated:

> The principles which should control the diplomatic relations of nations, and the good faith of treaties as

> well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.

Jordon v. *Tashiro*, 278 U.S. 124 at 127 (1928). *See also, Tucker* v. *Alexandroff*, 183 U.S. 424 (1902). *De Geofroy* v. *Riggs*, 133 U.S. 258 at 271 (1890).

A review of the Minutes of the Warsaw Convention, together with the proceedings leading up to the Convention and the comments of the drafters show that a correct interpretation of Article 20 is that the carrier is required to prove that it took "reasonable measures" to prevent the loss.

The rudiments of Article 20 are found in the draft convention drawn by the First International Conference on Private Air Law, held in Paris in 1925. *Conference Internationale de Droit Privé Aérien, Octobre-Novembre*, 1925 Paris at 77-83 (1926) (hereinafter referred to as Paris Conference).

Article 5 of the Paris Conference reads:[5]

> The carrier is liable for accidents, losses, damage and delays. He is not liable if he proves that he took the reasonable measures for preventing the damage.

App. p. A15.

The Reporter for the committee (Commission) of the Paris Conference which drafted Article 5, issued an interpretive report of the draft using similar language in

[5] Alitalia has had certain sections of some of the following passages translated from the original French. The translations will be used in the text. The certified translations appear in the Appendix.

explaining the notions underlying the liability system. M. Pittard, the Reporter, stated:

> The Commission asked itself which system of liability it was necessary to adopt: risk or fault. The general opinion is . . . that the theory of fault must be admitted.
>
> It is therefore just not to impose on the carrier an absolute liability, and to release him from any liability when he has taken the reasonable and normal measures to avoid damage; this is the diligence which can be demanded of a prudent man.
>
> [T]here is no liability without fault, the latter being presumed until proof is produced of the reasonable diligence.

Paris Conference at pps. 55-56. Certified translation at App. A13-A14.

Between the First International Conference on Private Air Law at Paris and the Second International Conference at Warsaw, a committee was established to prepare a draft treaty for the use of the Warsaw meeting. This Committee was Comité Internationale Technique d'Experts Juridique Aériens (hereinafter referred to as CITEJA). Throughout the various drafts the phrase "reasonable measures" was retained in the Article which ultimately became Article 20. The draft of the treaty finalized in Madrid in 1928, was presented for consideration to the Convention by Henri DeVos, Reporter for CITEJA, who stated:

> Deeming that it was not equitable to impose absolute liability upon the carrier, the conference admitted that the carrier could be freed from all liability when he had taken the reasonable and normal measures to avoid the damage.

Second International Conference on Private Aeronautical Law Minutes, Warsaw, 1929 at 252 (Horner and Legrez translation, 1975) [hereinafter referred to as Warsaw Minutes].

In the debate over what was to become Article 20, Professor Ripert of the French Delegation, in speaking of "the essence of the draft" in light "of the history of Article 22" (as it was then numbered), stated: ". . . All that can be asked from the air carrier is to take reasonable measures to avoid the damage . . ." Warsaw Minutes, p. 47. The delegate from Great Britain, Sir Alfred Dennis, added that a very clear explanation of the liability of the carrier was that which said:

> It is therefore just not to impose absolute liability upon the carrier, but to relieve him of all liability when he has taken reasonable and normal measures to avoid damage: This is the diligence which one can demand of the reasonable man.

Warsaw Minutes, p. 49.

Every draft of the Convention, including the final draft, contained the phrase "reasonable measures". The change to "all necessary measures" was based on a proposal of the Soviet Union. The change was described as a "question of wording", as opposed to a "question of substance". Warsaw Minutes, p. 276.

The Article was adopted without any comment as to the substitution of "all necessary measures" whatsoever. Thus, it seems clear that the change was one of form only and was not meant to alter the basic standard of "reasonable measures".

The District Court's interpretation of Article 20 also conflicts with the official views of the Executive Branch of

the United States Government. In a letter, dated March 31, 1934, to President Roosevelt recommending that the United States adhere to the Warsaw Convention, Secretary of State Cordell Hull explained this system of liability, saying:

> The effect of article 17 (ch. III) [which has essentially the same function as to passengers as Article 18 has to cargo] of the Convention is to create a presumption of liability . . . subject to certain defenses allowed under the Convention to the aerial carrier. The burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier or his agents.

Letter from Secretary of State Cordell Hull to President Roosevelt (March 31, 1934) *reprinted in* 1934 U.S. Av. Rep. 239, 243 (1934).

Since the District Court's interpretation of Article 20 ignores the fault basis of the Warsaw Convention's liability system, it conflicts with the above statement of the Secretary of State which shows that the damage must be "the result of negligence on the part of the carrier or his agents."

The reported authorities interpreting Article 20 conflict with the interpretation of the District Court. An authoritative article dealing with the meaning of Article 20 is *The Air Carrier's Liability in Cases of Unknown Damage in International Air Law—Part 1*, 27 J. Air L. & Com. 1 (1960), by F. Hjalsted. The author sets out to establish what the phrase "all necessary measures to avoid the damage. . ." means by examining: (1) the preparatory works to the Convention; (2) the proceedings at the convention; (3) various national Acts implementing and explaining the Warsaw Convention; (4) proposals formally made to revise the Convention; (5) the various authors and textwriters; and (6) court decisions in various countries dealing with the Convention. He states:

Summarizing the examination of the meaning of the expression of Art. 20 paragraph 1 that the carrier must prove that he and his servants or agents "have taken all necessary measures to avoid the damage or that it was impossible for him and them to take such measures," the following can be stated: The intention behind the original wording including the expression "the reasonable measures" was to introduce the principle that the carrier, his servants or agents, have to show due diligence—to act with the care of a *bonus pater familias*. In other words, the liability was based on fault. At the Warsaw Conference the expression was changed to "all necessary measures," but the principle behind the terminology remained unchanged. During the revision work on the Convention almost all statement gave expression to a meaning of these words in conformity with the original idea behind them. Also certain national Acts which have paraphrased Art. 20 paragraph 1 when implementing the Convention, have expressed themselves along these lines. An overwhelming majority of authors has held the same views, and the courts of several countries have approved this interpretation.

27 J. Air L. & Com. 1 (1960), p. 11 (emphasis in original).

This Hjalsted article also catalogs all of the authors who have interpreted Article 20, stating:

> Also, the overwhelming majority of the authors has construed "all necessary measures" as including a requirement for the exercising of due diligence—or the diligence of a *bonus pater familias*, see for example *Ripert, Coquoz, Giannini, Ambrosini, Lemoine, Riese, Beaumont, Picard, Chauveau, Litvine, Salinas,*

> *Schweickhardt*, and *Perucchi*. The same view has also been expressed by stating that "all necessary measures" are equivalent to "reasonable measures," see *Goedhuis, Shawcross and Beaumont*, and *McNair*, or that the carrier is not liable when no fault has been committed, *Ripert, Maschino, Sack, Lupton, Schleicher-Reymann* and *Knauth*.

Id. p. 9 (footnotes omitted).

Dr. D. Goedhuis, a noted commentator listed above, is specific in linking the legislative history to the intent in the final draft.

> The Conference [at Paris] agreed to this opinion and fixed in the draft convention the principle ***that the carrier is not liable if he has taken reasonable measures to avoid the damage.***
>
> Special attention must be drawn to the great importance of the Conference accepting this principle which clearly brings out that a carrier having taken "reasonable measures" has committed no fault and therefore has not failed in the obligation the contract put upon him.

D. Goedhuis, National Airlegislations and the Warsaw Convention (1st ed. 1937), p. 219 (emphasis in the original). Goedhuis later concludes:

> It is to be regretted that the original intention of the draftsmen of the Convention has become obscured in the present text of art. 20, owing to the modification concerning the liability of the carrier for his agents. Moreover it is unfortunate that the term "reasonable measures" which was always used in the draft conventions was changed into "necessary measures". The substitution of the word necessary for the word reason-

> able was made by the drafting committee at the Warsaw Conference. As the change was not discussed at a plenary meeting, it must be recognized that it was a modification of pure form and that the original idea remained exactly the same.

Id. pps. 236-237.

The following decisions have held that Article 20 requires that an air carrier prove that it acted with ordinary or due diligence to avoid the damage alleged. *Agrippina Assicurazione* c. *Scandinavian Aerlineas System* e c. *Società esercizi aeroportuali* [1969] Il Diritto, p. 181 (Corte d'appello, Milano) [Italy]; *Palleroni* vs. *S.A. de Navigazione Aeria,* Rivista di Diritto Aeronautico 1938, p. 141-151 (Corte di cassazione) [Italy]; *Csillag* vs. *Air France,* Tribunal civil de Toulouse, February 10, 1938 [extracts are published by M. Lemoine: Traite de Droit Aérien, Paris, 1947 p. 825 note (2)] [France].

The British cases have interpreted Article 20 to require a carrier to prove that it has exercised reasonable care to avoid the damage. *Grein* v. *Imperial Airways, Ltd.,* [1937] 1 K.B. 50 (1936) 55 Lloyd's List L. R. p. 318; *Chisholm* v. *British European Airways,* [1963] Lloyd's List L. R. p. 626.

The case law also reveals that the concept of fault is crucial and that a carrier may be liable only where it has not taken measures immediately and directly necessary to avoid the damage. *Dame Embs* c. *Air France,* Revue Generale de Droit Aérien 1969, p. 325 (Tribunal de Grande Instance, Paris) [France]; *Jugoslovenski Aéro-Transport* c. *Epoux Gati,* Revue Generale de L'Air 1962, p. 415 (Cour d'appel, Paris) [France]; *De Seguros* c. *Pan American Airways,* 1975 La Ley, p. 603 (Court of Appeals, Civil and Criminal Division II, Buenos Aires) [Argentina].

Therefore, by adopting an interpretation that requires a carrier to prove that it took *"all* reasonable measures" regardless of whether they would have prevented or avoided the damage, the District Court's decision is in conflict with the reported international authorities interpreting Article 20 of the Warsaw Convention.

The necessity for uniform interpretation of treaties is an important matter which calls for the exercise of certiorari jurisdiction.

> We granted certiorari because the cases involve important rights asserted in reliance upon federal treaty obligations.

Kolovrat v. *Oregon,* 366 U.S. 187 at 191 (1961).

Here, as has been shown above, the interpretation of Article 20 of the courts below is in conflict with the language of the Treaty, the intent of the drafters and is contrary to the interpretations of the reported international authorities. It is submitted that, before the United States adopts an interpretation of an international treaty different from that of the other parties to that treaty, the Court should, at least, consider that interpretation and the treaty itself. As was stated in *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323 (5th Cir. 1967):

> A multilateral treaty is rather like a "uniform law" within the United States. The Court has an obligation to keep interpretation as uniform as possible.

386 F.2d at 337-38.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case, as prayed herein.

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APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-7266

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of December, one thousand nine hundred and seventy-seven.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. MURRAY I. GURFEIN,
Circuit Judges.

MANUFACTURERS HANOVER TRUST COMPANY,

Appellee,

—against—

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Opinion of Court of Appeals

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is Affirmed on the opinion of Judge Conner below.

/s/ Sterry R. Waterman
Sterry R. Waterman

/s/ Leonard P. Moore
Leonard P. Moore

/s/ Murray I. Gurfein
Murray I. Gurfein

Circuit Judges.

Opinion of District Court

Reported at 429 F. Supp. 964 (1977)

UNITED STATES DISTRICT COURT

Southern District New York

No. 74 Civ. 3045(WCC)

April 13, 1977

Manufacturers Hanover Trust Company,

Plaintiff,

v.

Alitalia Airlines,

Defendant.

---

[965]

Hart & Hume, New York City, for plaintiff; William Hart, Robert B. Leonard, New York City, of counsel.

Condon & Forsyth, New York City, for defendant; Ronald E. Pace, John J. Quinn, New York City, of counsel.

Opinion

Conner, District Judge:

On January 4, 1974, a Wells Fargo truck delivered a parcel of nondescript appearance to Cargo Building No. 86 [Building 86], the export operations facility of Alitalia Airlines at John F. Kennedy International Airport, Jamaica, New York. Within two hours of its delivery to Building 86 pending transport aboard Alitalia flight 611, the parcel—containing bank notes in the sum of $200,000 consigned to the Umma Bank of Tripoli, Libya—was to

make an unscheduled landing in the hands of three gunmen. The latter, together with their prize, have to date escaped capture or recovery. What the gunmen gained, Manufacturers Hanover Trust Company lost, as shipper of the notes. Ultimate liability for that loss was the subject of a four-day, non-jury trial that began on June 8, 1976. This Opinion incorporates the Court's findings of fact and conclusions of law pursuant to Rule 52(a) F.R. Civ.P.

I.

At approximately one o'clock in the afternoon of January 4, 1974, James Brown, a security guard then employed by Beatty Protective Service, was dispatched to Building 86 on assignment, outfitted with street clothes, a .38 caliber police special, and the knowledge that he had been hired to guard high-value cargo of otherwise unidentified nature. Guided by Alitalia's assistant cargo manager and its deputy supervisor down a corridor fronted by offices, Brown was directed to a chair adjacent to an unmarked, locked door in view of a number of female typists. Thus stationed, Brown was instructed to, "Sit in this chair and watch the pretty girls." However pleasurable that initial scene according to Brown's subjective lights, the view became surely less agreeable shortly before 3:00 P.M., when Brown abruptly found himself looking into the barrel of a loaded revolver. Rather shakily holding the weapon was a man bearing the outward trappings of a Telephone Company repairman, accompanied by another similarly garbed.

[966] Thus addressed by a gun, gripped as it was in an unsteady hand, and by the electrifying announcement, "This is a stick-up," Brown—choosing wisdom's course—eschewed the weapon in his shoulder holster and speedily

retreated, with several Alitalia secretaries also in tow, through the corridor and into a men's room, obedient to directions of the gunmen.

Scant minutes earlier, the gunmen's initial contact with Nicola Amoruso, Alitalia's cargo operations manager, had been far more placid. Having proceeded into Building 86 through one of its unguarded entryways, and apparently having gained unchallenged access from the outer public area to the inner office area through a door marked "Authorized Personnel Only," the two had chanced upon Amoruso in their search for the Building 86 supervisor. After Amoruso had identified himself as the manager of operations, the pair explained that a communications problem had been traced to Building 86 and asked to be led to the building's telephone panel. The three-man procession down the corridor from Amoruso's office was suddenly halted, however, when—with revolvers freshly drawn and levelled at Amoruso—the gunmen declared their actual purpose, *i.e.*, to get "the shipment of money." Initially frozen in terror, and eventually achieving movement only by force of the gunmen's prodding, Amoruso—attempting to remain at least visibly calm—followed his assailants' order to instruct other Alitalia employees not to use their telephones pending "repairs," the gunmen meanwhile secreting their weapons beneath their jackets. That done, Amoruso and a secretary were herded into a ladies' room, soon to be involuntarily joined in the approximately 5′x5′ area by a contingent of some ten or more co-workers.

Shortly thereafter, one of the gunmen reclaimed Amoruso from the ladies'-room crush and ordered him to "open up the strong room." The sole key to the Building 86 "valuables room" was contained, Amoruso knew, in a cabinet—itself normally locked—in the assistant cargo manager's

office. Impelled by the gunman's apparent determination and impatience as well as by his weapon, Amoruso made his way to his assistant's office and discovered, to his relief, that the cabinet holding the valuables-room key had fortuitously been left open. With the key in his possession and the gunman at his heels, repeatedly threatening death if he triggered an alarm, Amoruso hastily repaired to the door of the valuables room—the post from which Brown had only moments before been unceremoniously relieved. The door was thereupon unlocked, revealing on the shelves within two lone packages. One, the parcel containing the bank notes, was promptly passed from Amoruso to the gunman. The second package, thereafter reported to have contained gold dental alloy worth some $60,000, apparently was ignored. Having served his fleeting purpose, and again being pushed toward the confines of the ladies' room, Amoruso noted that his two assailants had been joined by a third, a hooded figure without the Telephone Company gear of the others, but no less potently equipped with a gun.

Redeposited in the ladies' room, Amoruso joined his dozen or so colleagues resignedly awaiting deliverance. Their release came about five minutes later, when the door to the ladies' room was opened by Anthony Baldi, then the assistant cargo manager at Alitalia. During the major portion of the robbery's course, Baldi had been occupied by business that had taken him happily beyond Building 86 and that had kept him wholly unsuspecting of the drama within. Less happily, however, Baldi was to become a momentary participant in that drama upon his return to Building 86, when, accosted by the third gunman, he was first ordered to "freeze" and then to "turn around." Apparently dissatisfied with the execution of those commands,

the gunman pistol-whipped Baldi before fleeing through one of the building's exits. Bleeding and dizzy, Baldi summoned enough wit to telephone the airport police. Sounds from the lavatories nearby eventually brought Baldi to the aid of his colleagues within. By this time, all of the gunmen had quit the premises.

[967] Their ten-to-fifteen-minute captivity ended, the Alitalia employees eagerly emerged en masse from the lavatory, only to encounter five or six strangers with guns drawn, ordering them to "freeze." Assuming this new group to be a fresh wave of robbers, the former captives turned on their heels and ran "instinctively" back to the lavatory, a proven safe retreat. The armed men, however, were subsequently identified as members of the Port Authority police, dressed in civilian clothes, summoned scarcely minutes earlier by Baldi. Beyond the battery of police questions that inevitably would follow and the administration of necessary medical aid to the wounded Baldi, normalcy had returned to Building 86.

II.

As noted at the outset, the bank notes stolen from Building 86 on January 4, 1974 have never been retrieved. The parties herein agree, as does this Court, that the extent of Alitalia's liability, if any, for that loss must be determined by reference to the Warsaw Convention [the Convention], as reproduced in its English translation at 49 Stat. 3000 (1934). See Article 1(1)-(2) of the Convention.

Articles 18 and 20(1) of the Convention set the measure of plaintiff's present claim, the former in relevant part providing that "[t]he carrier shall be liable for * * * loss of * * * any goods * * * during [the period in] which the

* * * goods are in charge of the carrier * *," the latter providing that "[t]he carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Both parties herein apparently concede that Articles 18 and 20 in tandem operate to establish a presumption of carrier liability, in the event of a loss within the Convention's terms, that, in the present context,[1] may be rebutted only by defendant's persuasive proof that it took "all necessary measures" to prevent the loss at issue. See *Wing Hang Bank, Ltd.* v. *Japan Air Lines Co., Ltd.*, 357 F.Supp. 94 (S.D.N.Y. 1973); *Rugani* v. *K.L.M. Royal Dutch Airlines*, 4 Avi. 17,257 (N.Y.Ct. of City of N.Y.), *aff'd*, 285 App.Div. 944, 139 N.Y.S.2d 899 (1st Dep't), *aff'd*, 309 N.Y. 810, 130 N.E.2d 613 (1954); *Kraus* v. *Koninklijke Luchtvaart Maatschappij*, N.V., 92 N.Y.S.2d 315 (Sup.Ct. N.Y.Co. 1949); *cf. Grey* v. *American Airlines*, 227 F.2d 282 (2d Cir. 1955); Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv.L.Rev. 497, 500 (1967).

Both plaintiff and defendant have devoted considerable efforts to explain and support their respective constructions of the phrase "all necessary measures." But, in the end, a common-sense reading serves best. Thus, notwithstanding plaintiff's argument to the contrary, this Court concludes that the phrase "all necessary measures" cannot be read with strict literality, but must, rather, be construed to mean "all *reasonable* measures." After all, there could scarcely be a loss of goods—and consequently no call for

[1] Alitalia's affirmative defenses that plaintiff had been contributorily negligent and/or had assumed the risk of loss have apparently been abandoned. See Defendant's Post-Trial Memorandum at 14. Neither defense, it may be noted, finds support in the record.

operation of Article 20—were a carrier to have taken every precaution literally necessary to the prevention of loss. Nor, on the other hand, may a carrier escape liability under Article 20, as Alitalia suggests, by demonstrating no more than its recourse to some—as opposed to all—reasonable measures. In short, Article 20 requires of defendant proof, not of a surfeit of preventatives, but rather, of an undertaking embracing all precautions that in sum are appropriate to the risk, *i.e.*, measures reasonably available to defendant and reasonably calculated, in cumulation, to prevent the subject loss. Such construction finds implicit support in the few precedents squarely on point, see *Wing Hang Bank, Ltd.* v. *Japan Air Lines Co., Ltd., supra; Rugani* v. *K.L.M. Royal Dutch Airlines, supra*, and in the leading treatise on the Convention, see D. Goedhuis, National Airlegislations and the Warsaw Convention 217-38 (The Hague 1937).

[968] With so much determined, the question of Alitalia's liability in the present case need not detain us long. Alitalia, the record makes clear, did undertake a number of measures, each intrinsically reasonable, to secure high-value cargo held in its custody. The existence and structure of the Building 86 valuables room; the armed guard hired specially to obstruct illicit access thereto; the log-book record of high-value cargo, conscientiously maintained; Alitalia's refusal to accept high-value cargo deliveries until an armed guard's arrival; certain precautions taken by Alitalia to prevent undue circulation of documents reflecting a shipment of high-value cargo—all combined to demonstrate that defendant had not been wholly unmindful of nor unmoved by considerations of security. But such precautions would be, predictably enough, likely unavailing in the circumstance of an armed robbery, as wit-

ness the scenario at Building 86 on the afternoon of January 4, 1974. To preserve against such eventuality, more could—and should—have been done. With unrestricted access into Building 86 and through it, the armed guard stationed on a chair at the valuables-room entrance was positioned no more securely than the proverbial sitting duck. As Alitalia's own witnesses agreed, restrictions on access to and through the Building 86—or, at the least, an enclosure about the valuables-room and its guard—might have discouraged or frustrated robbery, if not insured against it. Moreover, armed robbery might have been prevented—or ultimately stymied—had a silent alarm system, with direct connection to the Port Authority police station, been installed on the premises of Building 86. The costs involved in the installation and annual maintenance of such a system, *i.e.*, $200 ad $300, respectively, would have been more than reasonable in light of its robbery-prevention value.

We cannot say, of course, that such precautions would necessarily have averted the loss upon which the instant suit is based. Nor, for that matter, can we say that Alitalia's employees, under the circumstances in which they found themselves on January 4, 1974, could and should have acted otherwise for the sake of thwarting their assailants' purpose. We conclude only—but nonetheless fatally for the defense—that Alitalia did not take all reasonable measures that prudent foresight would have envisioned for the securing of high-value cargo.

Alitalia's reference to the fact that the January 4, 1974 incident at Building 86 was the first instance of armed robbery involving an airline cargo warehouse at Kennedy Airport is mentioned if only to demonstrate that it has not been overlooked. That armed robbers had so far spared

such facilities could hardly have insulated the reasonably prudent airline carrier from the knowledge that an armed robbery of a cargo warehouse was a likely future contingency. Of no greater moment is defendant's observation that plaintiff had, within the space of some eighteen months preceding the robbery at Building 86, shipped without incident sixteen consignments of currency to the Umma Bank via Alitalia.

Equally unavailing to the defense is Alitalia's insistence that it necessarily be held to a standard of care no more rigorous than that observed by the majority of airlines at Kennedy Airport in 1974. In this respect, it is perhaps enough to note the following observations from Judge Learned Hand:

> "There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. * * *. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required * * *." *The T. J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

See also *Hageman* v. *Signal L. P. Gas, Inc.*, 486 F.2d 479, 483 (6th Cir. 1973); *Tormo* v. *Yormark*, 398 F.Supp. 1159 (D.N.J. 1975); *George* v. *Morgan Construction Co.*, 389 F.Supp. 253 (E.D.Pa. 1975).

Other airlines at Kennedy Airport, at least until January 1974, may well have [969] been less security conscious than was Alitalia; few, if any, may have been more

so. Nevertheless, if other airline cargo facilities might have been as, or more, awkwardly situated in the face of an armed robbery than was Building 86, that fact cannot confer added grace to Alitalia's posture herein.

III.

Under Article 22(2) of the Convention, carrier liability for the loss of freight must be limited to the sum of 250 francs per kilogram "unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires." Appearing on the fact of Air Waybill No. 055-3807-7830, the contract of carriage covering the bank notes now at issue, is plaintiff's special declaration of value in the amount of $200,000. Plaintiff has paid all charges imposed by the defendant carrier in connection with the air waybill, including a supplemental valuation charge of $200. In such event, the measure of plaintiff's damages is determined by the amount of value thus declared. See *Orlove* v. *Philippine Air Lines, Inc.*, 257 F.2d 384, 387-88 (2d Cir.), *cert. denied*, 358 U.S. 909, 79 S.Ct. 230, 3 L.Ed.2d 230 (1958).

In accordance with the foregoing, plaintiff shall have judgment in the amount of $200,000, with interest thereon at the rate of six per-cent per annum computed from January 4, 1974, plus costs.

Submit judgment order on notice.

Certified Translation

CONTINENTAL TRANSLATION SERVICE, INC.

6 East 43rd Street, New York, N. Y. 10017

Suite 2100

Telephone: (212) 867-3646

Certified translation cts #9209/scs
from: French

Il est donc juste de ne pas imposer au transporteur une responsabilité absolue et de le dégager de toute responsabilité lorsqu'il a pris les mesures raisonnables et normales pour éviter le dommage; c'est la diligence que l'on peut exiger du bon père de famille.

[I]l n'y a pas de responsabilité sans faute, celle-ci étant présumée jusqu'à preuve rapportée de la diligence raisonnable.

It is therefore just not to impose on the carrier an absolute liability, and to release him from any liability when he has taken the reasonable and normal measures to avoid damage; this is the diligence which can be demanded of a prudent man.

[T]here is no liability without fault, the latter being presumed until proof is produced of the reasonable diligence.

Addendum—Certified Translation

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Certified translation cts #9209/scs
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La Commission s'est demandée quel régime de responsabilité il fallait adopter: risque ou faute. L'opinion générale est . . . [qu']il faut admettre la théorie de la faute.

The Commission asked itself which system of liability it was necessary to adopt: risk or fault. The general opinion is . . . that the theory of fault must be admitted.

Addendum—Certified Translation

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from: French

Article 5.

Le transporteur est responsable des accidents, pertes, avaries et retards. Il n'est pas responsable s'il prouve avoir pris les mesures raisonnables pour éviter le dommage.

Article 5.

The carrier is liable for accidents, losses, damage and delays. He is not liable if he proves that he took the reasonable measures for preventing the damage.

Addendum—Certified Translation

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Certified translation cts #9209/scs
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CERTIFICATE OF ACCURACY

State of New York) s.s.:
County of New York)

On this day personally appeared before me, Stanley C. Scribner who, after being duly sworn, deposes and says:

That he is a translator of the French and English languages by profession and as such is connected with the CONTINENTAL TRANSLATION SERVICE.

That he is thoroughly conversant with these languages.

That he has carefully made the attached translation from the original document written in the French language on the official paper of the CONTINENTAL TRANSLATION SERVICE; and consisting of 4 paragraphs of legal French Re: carriers' liability.

That the attached translation is a true and correct English version of such original, to the best of his knowledge and belief.

S. C. SCRIBNER

Subscribed and sworn to before me
this 26th day of August, 1977

ARTHUR A. PALEN
Arthur A. Palen
Notary Public, State of New York
No. 31-2999825
Qualified in New York County
Commission Expires March 30, 1979

Supreme Court, U. S.
FILED
MAR 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1210

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

vs.

MANUFACTURERS HANOVER TRUST COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Manufacturers Hanover Trust Company opposes the petition of Petitioner Alitalia-Linee Aeree Italiane, S.p.A. (Alitalia) for a writ of certiorari to review the judgment herein of the United States Court of Appeals for the Second Circuit, on the ground that there are no special and important reasons for such review within the meaning of Rule 19 of this Court.

Statement of the Case

The major issue presented by this case is not whether the courts below were correct in their "common-sense reading" of Article 20 of the Warsaw Convention, but rather whether, as a factual matter, Alitalia took sufficient security precautions to protect the $200,000 in United States currency which was in Alitalia's charge in its Cargo Building 86 inside John F. Kennedy International Airport. The district court, whose opinion was adopted by the court of appeals, held that Article 20 of the Warsaw Convention required of Alitalia

> "proof, not of a surfeit of preventatives, but rather, of an undertaking embracing all precautions that in sum are appropriate to the risk, *i.e.*, measures reasonably available to [Alitalia] and reasonably calculated, in cumulation, to prevent the subject loss." 429 F.Supp. 964, 967 (S.D.N.Y. 1977).

The district court then found, as a matter of fact, that Alitalia

> "did not take all reasonable measures that prudent foresight would have envisioned for the securing of high-value cargo." 429 F.Supp. at 968.

The district court found that Alitalia took certain measures to secure high value cargo held in its custody, "all [of which] combined to demonstrate that [Alitalia] had not been wholly unmindful of nor unmoved by considerations of security." 429 F.Supp. at 968. These measures consisted primarily of keeping high value cargo in a locked valuables room; hiring an armed guard to sit in front of

the valuables room; refusing to accept the shipment until the guard had arrived; maintaining a log-book record of high value cargo; and taking certain precautions to prevent undue circulation of documents reflecting a shipment of high value cargo. However, after hearing the testimony of six witnesses called by Alitalia to testify on this subject, and on the basis of many documents received in evidence, the district court found that the measures taken by Alitalia

> "would be, predictably enough, likely unavailing in the circumstance of an armed robbery. . . ." 429 F. Supp. at 968.

The district court found that Alitalia did not take at least three measures which it should have taken as reasonable precautions against armed robbery.

Access into and through Cargo Building 86 should have been restricted. The importance of restricting access to the cargo area was confirmed by every witness who testified on the subject and by numerous documents in evidence. Nevertheless, the district court found that access into Cargo Building 86 and through it was unrestricted and that

> "restrictions on access to and through Building 86 . . . might have discouraged or frustrated robbery, if not insured against it." 429 F.Supp. at 968.

There should have been an enclosure around the valuables room and its guard, which would have permitted the guard to challenge a person approaching the valuables room before that person was close enough to overpower him. The armed guard employed by Alitalia was not in a position to challenge persons approaching him and was

found by the district court to have been positioned "no more securely than the proverbial sitting duck." 429 F. Supp. at 968.

There should have been a silent alarm system with a direct connection to the switchboard of the Port Authority Police. Several witnesses and many documents in evidence confirmed that a silent alarm system with direct connection to the police is an important and effective security measure, but Alitalia admittedly had no alarm system or any other kind of emergency summoning system in Cargo Building 86 at the time of the robbery, having removed an existing alarm system a few years earlier and re-installed it in what was then a new import warehouse off the grounds of the airport. The district court found that

> "armed robbery might have been prevented—or ultimately stymied—had a silent alarm system, with direct connection to the Port Authority police station, been installed on the premises of Building 86. . . ." 429 F.Supp. at 968.

Argument

Contrary to Alitalia's suggestion, the district court's interpretation of Article 20 of the Warsaw Convention is not inconsistent with the plain meaning of the Convention or with any case law or authority on the subject, but rather is, as the district court stated, "a common-sense reading" which is supported by the few cases on point and by the leading treatise on the Convention.

Alitalia concedes that in order to avoid its presumptive liability in this action, it must prove that it took "all necessary measures to avoid the damage" within the meaning of Article 20 of the Warsaw Convention. The term "all necessary measures" is not defined by the Convention. The district court held that

> "the phrase 'all necessary measures' cannot be read with strict literality, but must, rather, be construed to mean 'all *reasonable* measures.' " 429 F.Supp. at 967. (Emphasis in original.)

The district court therefore concluded that

> "In short, Article 20 requires of [Alitalia] proof, not of a surfeit of preventatives, but rather, of an undertaking embracing all precautions that in sum are appropriate to the risk, *i.e.*, measures reasonably available to [Alitalia] and reasonably calculated, in cumulation, to prevent the subject loss." 429 F.Supp. at 967.

Alitalia's disagreement with the district court's interpretation seems to turn on the word "all", which Alitalia seems to suggest should be read out of the Convention and replaced with the word "any". We believe that there is no support for Alitalia's proposed construction of the Convention. The carrier's conduct must be viewed in its totality; the court cannot, as Alitalia would have it do, isolate a particular act of the carrier, find that act to have been reasonable and hold that the carrier has, as a result, satisfied its burden under the Warsaw Convention. *Wing Hang Bank, Ltd.* v. *Japan Air Lines Co., Ltd.*, 357 F.Supp. 94 (S.D.N.Y. 1973); *Ritts* v. *American Overseas Airlines, Inc.*, 1949 U.S. Aviation R. 65 (S.D.N.Y. 1949); *Rugani* v. *K.L.M. Royal Dutch Airlines*, 4 Avi. 17,257 (New York City Court 1954), aff'd 285 App. Div. 944, 139 N.Y.S. 2d 899 (1st Dept. 1954), aff'd, 309 N.Y. 810 (1954).

Alitalia suggested to the courts below that the standard of "all necessary measures" is analogous to the standard of "due diligence" as used in determining liability in maritime law. However, the cases which apply the "due diligence" standard do not absolve the shipowner of liability simply because he took some reasonable measures, if there were other reasonable measures which he should have taken and did not. *Ore Steamship Corporation* v. *D/S A/S Hassel,* 137 F.2d 326 (2 Cir. 1943); *The Anaconda,* 60 F.2d 898 (2 Cir. 1932); *California and Hawaiian Sugar Refining Corp.* v. *Winco Tankers, Inc.,* 278 F.Supp. 648 (E.D.La. 1968). See also, *Cameco, Inc.* v. *S.S. American Legion,* 514 F.2d 1291 (2 Cir. 1974); *Walker* v. *Harris,* 335 F.2d 185 (5 Cir. 1964), cert. denied 379 U.S. 930, 13 L.Ed.2d 342, 85 S.Ct. 326 (1964); *General Foods Corporation* v. *The Troubador,* 98 F.Supp. 207 (S.D.N.Y. 1951).

The district court concluded that the Warsaw Convention does not impose absolute liability upon the carrier for loss of, or damage to, goods and that "the phrase 'all necessary measures' cannot be read with strict literality ...." 429 F.Supp. at 967. In this regard, the district court was plainly in accord with the authors, commentators and foreign cases referred to in Alitalia's petition. The district court's determination that "Alitalia did not take all reasonable measures that prudent foresight would have envisioned" is amply supported by the evidence and raises no special or important reason for review by this Court.

Conclusion

Alitalia's petition for a writ of certiorari to review the judgment herein of the United States Court of Appeals for the Second Circuit should be denied.

New York, New York
March 27, 1978

Respectfully submitted,

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Supreme Court, U. S.
FILED
APR 4 1978
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1210

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

v.

MANUFACTURERS HANOVER TRUST COMPANY,

Respondent.

REPLY BRIEF

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OCTOBER TERM, 1977

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Respondent.

REPLY BRIEF

Respondent's Brief in Opposition makes only one assertion: the question whether petitioner proved its affirmative defense of having taken "all necessary measures to avoid the damage" pursuant to Article 20 of the Warsaw Convention is one of fact. Petitioner agrees that whether a party meets its burden of proof usually is a question of fact. But, if the wrong legal standard is applied, the factual evaluations made thereon are erroneous. As the Court stated in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson,* 390 U.S. 414 (1968):

> Evaluations of evidence reached by accurate application of erroneous legal standards are erroneous evaluations.

390 U.S. at 444-45.

This case is important because the District Court, by erroneously interpreting a treaty of the United States, has imposed a legal standard upon all airlines that is *impossible to meet*. It is impossible to meet because it requires an airline to take all economically reasonable measures to protect against an armed robbery of a cargo facility whether or not those measures would actually prevent or avoid the robbery.

More importantly, however, the District Court's interpretation of the treaty does away with the fault concept that is the foundation of the Warsaw Convention system of liability. The District Court found Alitalia liable for the loss occasioned by the armed robbery on the basis of its failure to take two measures that the court refused to find would have prevented or avoided the loss. The District Court did not find that petitioner was negligent; rather, it found that petitioner's employees acted non-negligently. The District Court did not find that petitioner did not meet the reasonable care required of an airline in protecting high-value cargo; rather, the District Court found that petitioner met or exceeded industry standards. The District Court did not find a single measure that was so important in avoiding the damage that the industry standard of care was, as a whole, inadequate[1]; in fact, the District

[1] In this regard all of the admiralty cases cited by respondent are opposed to the District Court's decision. In those cases the courts found that the ship owner did not meet the industry standard of care: *Ore Steamship Corporation* v. *D/S A/S Hassel*, 137 F.2d 326 (2d Cir. 1943) (superficial inspection held inadequate); *The Anaconda*, 60 F.2d 898 (2d Cir. 1932) (superficial inspection held inadequate); *General Foods Corporation* v. *The Troubador*, 98 F.Supp. 207 at 211 (S.D.N.Y. 1951) (superficial inspection held inadequate and ventilation not up to industry standard). For example, in *California & Hawaiian Sugar R. Corp.* v. *Winco Tankers, Inc.*, 278 F.Supp. 648, 653 (E.D.La. 1968), the court held that due diligence is "what a reasonably prudent vessel owner would have done."

Court refused to find that either of the measures suggested by respondent would even have avoided the loss.

Neither respondent nor the District Court found a single measure, which petitioner's failure to take, caused the loss. In short, no fault of petitioner was established in the trial court. Rather, petitioner was found liable because it failed to take *"all reasonable measures"* regardless of whether those measures would have avoided the damage. Yet, to avoid liability, the Warsaw Convention requires only that a carrier show that it took reasonable "measures *to avoid the damage*".

This case presents not a question of fact, but rather an important question of the legal standard imposed by a treaty of the United States upon airlines with respect to the transportation of cargo. The District Court, has created a standard of care—all reasonable measures whether or not they avoid the damage—that will, as a practical matter, be impossible for an airline to meet[2]. The airline industry ships literally millions of dollars worth of high-value cargo, out of J.F.K. International Airport alone, each day. The ramifications of the decisions below and the impossible legal standard created by the District Court's erroneous interpretation of a treaty of the United States far transcend the particular interests of the parties to this action.

[2] It is interesting that one of the two "reasonable" measures suggested by respondent—restricted access—is not practiced by its own facilities (banks) which are held by the law to a higher standard of care than airlines.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case, as prayed herein.

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April 3, 1978

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Certificate of Service

I hereby certify that I have, this 3rd day of April, 1978, served the foregoing Reply Brief upon respondent by depositing same in a United States mailbox at 1 Rockefeller Plaza, New York, New York 10020, with first class postage prepaid, addressed to:

HART & HUME
10 East 40th Street
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April 3, 1978

.....

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Supreme Court, U. S.
FILED
APR 12 1978
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IN THE

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OCTOBER TERM, 1977

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Petitioner,

v.

MANUFACTURERS HANOVER TRUST COMPANY,

Respondent.

BRIEF OF SWISSAIR TRANSPORT COMPANY LIMITED AND LUFTHANSA GERMAN AIRLINES AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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—and—

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In the

Supreme Court of the United States

October Term, 1977

No. 77-1210

Alitalia-Linee Aeree Italiane, S.p.A.,

Petitioner,

v.

Manufacturers Hanover Trust Company,

Respondent.

BRIEF OF SWISSAIR TRANSPORT COMPANY LIMITED AND LUFTHANSA GERMAN AIRLINES AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Swissair Transport Company Limited (hereinafter Swissair) and Lufthansa German Airlines (hereinafter Lufthansa) submit this brief as *amici curiae* in support of the petition for a writ of certiorari herein, to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered on December 1, 1977.

Both counsel for Petitioner and Respondent have consented to the filing of this brief and the brief is submitted pursuant to Rule 42.

I

Interest of the *Amici Curiae*

Swissair and Lufthansa are international air carriers engaged in the transportation of passengers and cargo by

air into and out of the United States as well as many other countries throughout the world. The decision of the courts below in this case, if allowed to stand, will have a profound effect upon the operation of both Swissair and Lufthansa in the United States. Both Swissair and Lufthansa, carry a large amount of high value cargo into and out of the United States. Both, therefore, are extremely concerned with the standard of care to which an air carrier will be held with regard to the handling of high-value cargo in the United States. Since this standard should be pursuant to the Warsaw Convention's provisions, it should be uniform throughout the world. However, Swissair and Lufthansa believe that the standard propounded by the District Court constitutes a unique, and we think erroneous, interpretation of the Warsaw Convention that, if not changed by the Court, will seriously and adversely affect the transportation of high-value cargo into and out of the United States by air carriers.

II

Reasons for Granting the Writ

The decisions below have construed a treaty of the United States in such a way so as to conflict with: the express terms of the treaty; the intent of the drafters of the treaty; the official position of the Executive Branch of the United States Government; the reported international authority interpreting the treaty; and the existing authority in the United States.

(a) Petitioner's brief adequately demonstrates the specific ways in which the decisions of courts below are in direct conflict with the express terms of the treaty (pps. 8-10), violate the intent of the drafters of the treaty (pps. 10-12), ignore the official position of the Executive Branch

of the United States Government (pps. 12-13), and conflict with the interpretations of all international authority. Rather than belabor the Court with a repetition of these points, Swissair and Lufthansa adopt these arguments as their own.

(b) The respondent, in its Brief in Opposition at p. 5, suggests that the decision of the District Court is supported by three United States cases. Not only do these cases not support respondent, but the interpretations of the Warsaw Convention by various courts in the United States conflict with the interpretation adopted by the District Court below.

At the outset, it is important to realize that the District Court, by finding Alitalia liable on the basis of its failure to implement two measures, which the court refused to find would have avoided the loss, interpreted Article 20 to require a carrier to prove that it took *all reasonable measures whether or not they would avoid the loss.*

In *Rugami* v. *KLM Royal Dutch Airlines,* 4 Avi. 17254 (N.Y.C. Civ. Ct. 1954), which also involved a cargo loss, the court went to great length to distinguish between the presumption of liability contained in Article 18 and common law liability of a common carrier as an insurer:

> To hold that article 18 makes the defendant an insurer would render abortive any attempt by defendant to establish that it or its agents took "all necessary measures to avoid the damage or that it was impossible for him or them to take such measures" as provided for in Article 20.

4 Avi. at 17,258. This case is further illustrative of what the Article 20 defense consists, in light of the facts adduced there to underlie liability. For instance, almost *no* secu-

rity measures had been taken. 4 Avi. 17,258-260. Next, the airline did not conform to the industry standards as far as security was concerned. Finally, the airline was held not to have established that its employees, during the robbery, were acting non-negligently.

The *Wing Hang Bank, Ltd.* v. *Japan Air Lines Co.*, 357 F.Supp. 94 (S.D.N.Y. 1973) case is inapposite. That case did not deal with Article 20 at all. The air carrier (J.A.L.) had conceded liability and interposed no Article 20 defense. It is interesting to note, however, that based on the taking of measures far less stringent than those taken by Alitalia herein, the court said:

> Indeed, it is difficult to term either [J.A.L. or American Airlines] negligent in the handling and processing of the shipment . . .
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> • • •
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> Moreover, on the basis of the evidence disclosed on this record, the proximate cause of plaintiff's loss was the armed robbery, and not the carelessness, malfeasance or misfeasance of the carriers . . .

357 F.Supp. at 97.

In *Ritts* v. *American Overseas Airlines*, 1949 U.S. Aviation R. 65 (S.D.N.Y. 1949), the court stated:

> [I]n order to avoid all liability it is necessary for the carrier to prove by a preponderance of the evidence that the carrier and its agents took all reasonable and necessary measures *to avoid the damage* . . .

1949 U.S. Aviation R. at 70. In that case, even though the cause of the accident was unknown, the jury returned a verdict in favor of defendant on the basis that it had shown that it had conformed to the standard of a reasonable airline. The important point here is that the inclusion of the concept of causation is essential to the Article 20 defense as part of the Warsaw Convention's liability system based on fault.

In *Geopp* v. *American Overseas Airlines*, 281 App. Div. 105 (N.Y. App. Div. 1952), the court held that causation was crucial to liability determinations under the Warsaw Convention, although in *Geopp*, the court was only dealing with Article 25.

In *Pick* v. *Lufthansa German Airlines*, 9 Avi. 18,077 (N.Y.C. Civ. Ct. 1965), the court established that there is a significant distinction between the Warsaw Convention standards of liability pursuant to Article 20 and that of common law. After quoting Article 20, the court stated:

> At common law the liability of the common carrier is often described as that of an insurer of the goods carried, and his defenses are limited to act of God or of the King's Enemies [enemies of the People of the State of New York or of the United States do not include, for this discussion, hijackers or other felons whose conduct falls short of treasonous insurrection], inherent vice of the goods, or negligence of the shipper.

9 Avi. at 10,081. (Citations omitted). The court characterized the Article 20 standard as a "somewhat lower standard of care". Whereas, as a practical matter, the District Court below has made an air carrier an insurer of high-value cargo in any case where there is a single economically reasonable measure which an air carrier might have taken even though it would not have prevented the loss.

One of the most renown commentators on the Warsaw Convention, Dr. Goedhuis, in his section on Article 20, wrote:

The capital point of the Convention of Warsaw is found in this article. As regards the rules concerning liability of the air carrier, the authors of the Convention of Warsaw were supporters of the theory of fault.

* * *

The Conference agreed to this opinion and fixed in the draft convention the principle *that the carrier is not liable if he has taken reasonable measures to avoid the damage.*

Special attention must be drawn to the great importance of the Conference accepting this principle which clearly brings out that a carrier having taken "reasonable measures" has committed no fault and therefore has not failed in the obligation the contract put upon him.

D. Goedhuis, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION (1st. ed. 1937), pps. 217, 219 (emphasis in the original).

This crucial question of the fault basis of the Convention has not escaped the attention of judges in the United States.

> [I]n awarding $8,300 damages [pursuant to articles 17 and 22] to the plaintiffs, [the court] implicitly found that the defendant was negligent since such an award could only have been made under the Warsaw Convention on a finding of negligence.

Berguido v. *Eastern Air Lines, Inc.*, 369 F.2d 874, 881 (3d Cir. 1966) (dissent of Kalodner). The decision of the District Court is, therefore, contrary to the interpretations of courts in the United States of the Warsaw Convention.

This fundamental error of the District Court, in eschewing the fault basis of the Convention, is of tremendous importance. As a practical matter, it will put airlines in the position of being insurers of all high-value cargo. This, in turn, will gravely affect the ability of Swissair and Lufthansa to carry high-value cargo as at present.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Dated: April 12, 1978

Respectfully submitted,

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Certificate of Service

I hereby certify that I have, this 12th day of April, 1978, served the foregoing Brief of Swissair Transport Company Limited and Lufthansa German Airlines as *Amici Curiae* in Support of the Petition for a Writ of Certiorari upon the parties to the action by depositing same in a United States mailbox at 608 Fifth Avenue, New York, New York 10020, with first class postage prepaid addressed to:

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